No. 92-259

In The

Supreme Court of the United States

October Term, 1992

OKLAHOMA TAX COMMISSION, *Petitioner,*

v.

SAC AND FOX NATION, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF ON THE MERITS BY PETITIONER

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Preliminary Matter

QUESTIONS PRESENTED

1. Whether Sac and Fox tribal members who are employed by the Sac and Fox Nation are subject to Oklahoma income taxes on their wages earned from tribal employment.

2. Whether Sac and Fox tribal members who register their motor vehicle with the Tribe and buy a tribal license tag, thus become exempt from:

   a. The payment of Oklahoma motor vehicle excise taxes imposed on the tribal members' purchase of the vehicle, or

   b. Registering and licensing their vehicles under State law for use upon State roads and highways, and paying State license and registration fees imposed by State law.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 967 F.2d 1425, and is reprinted in the Petition for Cert. page A-1.

The Order of the United States District Court for the Western District of Oklahoma (Alley, D.J.) has not been reported. It is reprinted in the Petition for Cert., page A-9. The Order of the District Court on rehearing is not reported and is reprinted in the Petition for Cert., page A-14.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C.

§1254(1). The opinion of the Court of Appeals for the Tenth Circuit was entered on June 16, 1992. No petition for rehearing was sought. The Petition for Writ of Certiorari was docketed in this Court on August 10, 1992. The Petition was granted on November 9, 1992.

STATEMENT OF THE CASE

This case involves the Oklahoma Tax Commission's enforcement of State tax laws against individual persons who are members of the Sac and Fox Nation. Specifically, the Commission is attempting to collect State income taxes from tribal members who are employed by the Tribe and work primarily on Indian country within Oklahoma. Also, the Commission seeks to collect motor vehicle excise taxes and license and registration fees imposed on vehicles owned by Sac and Fox tribal members and used upon the State's roads and highways.

The Sac and Fox Nation is a federally recognized Indian tribe located within the State of Oklahoma, which is organized pursuant to the Oklahoma Indian Welfare Act, 25 U.S.C. §501 et seq. The offices of the tribal headquarters are located near Stroud, Oklahoma, on a quarter-section (160 acres) excepted from operation of the Sac and Fox Allotment Agreement, Act of February 13, 1891, 26 Stat. 749, and is held in trust by the United States Government for the benefit of the Tribe. Within the area of the former Sac and Fox Reservation in central Oklahoma, the United States also holds other tracts of land in trust for the Tribe or its members. These tracts vary in size from a few acres to 640 acres and are not contiguous but are randomly scattered throughout the area among land that is otherwise within the jurisdiction of State government. The tribal trust land constitutes Indian Country as that term is defined in 18 U.S.C. §1151, and is within the jurisdiction of the tribal government. The Tribe employs both tribal members and nonmembers at its headquarters who primarily perform their duties on Indian Country at the headquarters building but may perform some duties off of Indian Country. Some employees of the Tribe may live on Indian Country and some employees do not

live on Indian Country but no one resides at the tribal headquarters.

The Tribe imposes an income tax on both members and nonmembers who are employed by the Tribe. The Tribe also imposes taxes on motor vehicles owned by any person or entity which are principally garaged on Indian Country under the jurisdiction of the Sac and Fox Nation. The Oklahoma Tax Commission does not challenge the Tribe's right to impose these taxes, but claims that the tribal members and nonmembers are also obligated to pay State income and motor vehicle taxes pursuant to State law, regardless of whether or not tribal taxes have been paid by those individuals.

The State imposes an income tax on all residents and nonresidents who receive income in Oklahoma pursuant to the Oklahoma Income Tax Act, 68 O.S. 1991 §2351 et seq. All tribal employees, whether tribal members or nonmembers, or any person who receives income for employment or work performed on Indian Country or elsewhere within Oklahoma are subject to pay Oklahoma income taxes. The State does attempt to assess and collect the income tax from such persons if they fail to report their income and pay those taxes.

The State also imposes a motor vehicle excise tax on the transfer of ownership or use of a motor vehicle in this State pursuant to the Vehicle Excise Tax Act, 68 O.S. 1991 §2101 et seq., and the State imposes an annual registration fee on the owners of every vehicle operated upon, over, along or across any avenue of public access in this State pursuant to the Oklahoma Vehicle License and Registration Act, 47 O.S. 1991 §1101 et seq. The Commission enforces the motor vehicle tax when a person, who had purchased a tribal license for their vehicle, subsequently sold that vehicle. The subsequent owner of the vehicle is required to pay the delinquent back taxes on the vehicle for the years the vehicle was tribally licensed in order to obtain an Oklahoma title and license plate for the car. The Commission will not issue a title on the basis of the previous owner's tribal title because the Commission contends that the State taxes are properly due and owing for that period. See Stipulation of Facts in Preliminary

Status Report, JA 16 and Statement of Material Facts as to which there is no substantial controversy, JA 28.

Because the Commission had assessed tribal employees for income taxes on wages from tribal employment and had required that delinquent motor vehicle taxes be paid for the period a vehicle was tribally licensed when the vehicle was sold, the Tribe brought an action against the Commission in the United States District Court for the Western District of Oklahoma to enjoin the Commission from enforcing the State income and motor vehicle taxes against its tribal members and others. The jurisdiction of the District Court was invoked under 28 U.S.C. §1362 because the Respondent is a federally recognized Indian tribe.

The District Court entered its Order on April 17, 1991, disposing of the litigants cross-motions for summary judgment. This Order is reprinted in the Petition for Cert., page A-9. The District Court found that the State should be enjoined from enforcing income taxes against wages earned by tribal members from tribal employment but that nonmembers employed by the Tribe were subject to State income tax.

The Court also enjoined the State from enforcing its motor vehicle taxes against a tribal member who properly licensed the vehicle with the Tribe by requiring the payment of the delinquent back taxes when the vehicle was sold. However, the injunction only extended to tribal members who own vehicles that are primarily garaged on trust land and licensed by the tribe of which they are members. Nonmembers of the tribe were required to pay all applicable State motor vehicle taxes. The District Court denied the motions for rehearing filed by each party, see Order at page A-14, in the Petition for Cert.

Both parties appealed this decision to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit's opinion, reprinted at page A-1 pet. cert., affirmed the decision of the District Court. Both the Tenth Circuit and the District Court declined to reach the issue of the extent of the Sac and Fox Reservation or whether the Reservation had been disestablished and refused to enter the required individualized treatment of particular treaties and specific federal statutes as they affect the

respective rights of States, Indians, and the Federal Government, ***Mescalero Apache Tribe v. Jones***, 411 U.S. 145 (1973). Instead, the lower courts concluded that under the authority of ***McClanahan v. Arizona State Tax Commission***, 411 U.S. 164 (1973), tribal members in any circumstances employed by the Tribe are not subject to State income taxes and pursuant to this Court's opinion in ***Washington v. Confederated Tribes of Colville***, 447 U.S. 134 (1980), those tribal members were not responsible for State motor vehicle taxes either.

SUMMARY OF THE ARGUMENT

This case involves whether the State of Oklahoma can collect income taxes from Sac and Fox tribal members who earn wages from employment by the Sac and Fox Nation. Also, the case concerns whether the state may require tribal members to pay vehicle excise taxes and registration fees on automobiles owned by the tribal member which are properly registered and licensed with the Tribe.

The Commission first argues that the extent or existence of the Sac and Fox Reservation is a relevant issue in this case because the geographical component to tribal sovereignty is an important factor to weigh in determining state authority. ***White Mountain Apache Tribe v. Bracker***, 448 U.S. 136 (1980). The Commission contends that the Sac and Fox Reservation was terminated pursuant to the ***Sac and Fox Allotment Agreement of February 13, 1891***, 26 Stat. 749, and the extent of Indian Country remaining in Oklahoma consists of plots of trust land of various sizes scattered among land which is otherwise within state jurisdiction. The intent and result of this Agreement was the termination of the Sac and Fox Reservation. ***DeCoteau v. District County Court***, 420 U.S. 425 (1975).

The Commission then discusses whether, within these circumstances, the income tax as applied to tribal members is either pre-empted by federal statute or impermissibly infringes tribal self-government. The Commission contends that the relevant federal statute did not provide for the pre-emption of state laws

because the Allotment Agreement was intended to assimilate the Indians into the general community of the state rather than leave the internal affairs of the Indians exclusively within the jurisdiction of the tribal government, ***McClanahan v. Arizona State Tax Commission***, 411 U.S. 164 (1973). Therefore, the Sac and Fox Nation lost its independent autonomy under the assimilation policy of the Agreement such that tribal self-government is not infringed by the duty of tribal members to pay state taxes in this context, ***Oklahoma Tax Commission v. United States***, 319 U.S. 598 (1943).

Next, the Commission contends that tribal members are not immune from payment of vehicle excise tax on the transfer of a motor vehicle, first because no federal statute exists to pre-empt the law and tribal government is not infringed, and second because the transaction of purchasing a motor vehicle occurs off of Indian Country which leaves the case clearly within state jurisdiction, ***Mescalero Apache Tribe v. Jones***, 411 U.S. 145 (1973).

Finally, the Commission asserts that tribal members are subject to pay annual vehicle registration fees on vehicles they own in Oklahoma for the reason that the state law is not barred by pre-emption or infringement and the state has a greater interest in the revenues than the Tribe since the tax is directed at off-reservation value and the taxpayer is the recipient of state services because all roads in Oklahoma are constructed and maintained by the state and the Tribe provides none of these services, ***Washington v. Confederated Tribes of Colville***, 447 U.S. 134 (1980).

ARGUMENT

I. TRIBAL MEMBERS OF THE SAC AND FOX NATION ARE SUBJECT TO OKLAHOMA INCOME TAXES ON WAGES EARNED FROM TRIBAL EMPLOYMENT.

A. THE SAC AND FOX RESERVATION WITHIN THE FORMER INDIAN TERRITORY HAS BEEN DISESTABLISHED.

This Court has ruled in ***White Mountain Apache Tribe v. Bracker***, 448 U.S. 136 (1980), at 142 that Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art. 1, §8 cl. 3. This congressional authority and the "semi-independent position" of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law, e.g. ***Warren Trading Post Co. v. Arizona Tax Commission***, 380 U.S. 685 (1965). Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them, "***Williams v. Lee***, 358 U.S. 217 (1959).

The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply ingrained in our jurisprudence that they have provided an important backdrop against which vague or ambiguous federal enactments must always be measured, ***McClanahan v. Arizona State Tax Commission***, 411 U.S. 164 (1973).

In the present case, the Oklahoma Tax Commission (Com-

mission hereafter) contends that enforcement of Oklahoma income and motor vehicle taxes against Sac and Fox tribal members is not precluded by either barrier. In order to reach this conclusion, the Commission has argued that the Sac and Fox Reservation has been disestablished by the Sac and Fox Allotment Agreement, Act of February 13, 1891, 26 Stat. 749. The Commission raised this issue in both of the lower courts, see Preliminary Status Report, JA 17.

However, both of the lower courts refused to address this issue, see District Court Orders Pet. Cert. A-11, A-15 and Tenth Circuit opinion, footnote 2, Pet. Cert. A-4. The lower courts found that the existence of the reservation was irrelevant in terms of determining whether or not the application of State laws in this case is barred because trust land, validly set apart for Indian use under government supervision, qualifies as a reservation for tribal immunity purposes pursuant to ***Oklahoma Tax Commission v. Citizen Band Potawatomi***, _____ U.S. _____, 111 S.C. 905 (1991). From this, the Tenth Circuit reasoned in footnote 2 of its opinion, Pet. Cert. A-4, that "The focus in this type of case is tribal immunity from state jurisdiction." The Appeals Court found that the State cites no authority for its proposition that the size and physical distribution of Indian country should control the degree of tribal immunity asserted on those lands. Therefore, using the ***McClanahan*** case as its authority, the Appeals Court ruled in Section II A of its opinion that the State income tax is barred because "The State asserts no congressional authority for imposing the state taxes at issue."

The Commission suggests that the Tenth Circuit opinion in Section II A (Pert. Cert. A-4) is mistaken in several particulars. First, the ***Potawatomi*** case involved the Commission's attempt to tax a tribe on transactions within Indian Country between the tribe and its members by way of directly assessing or suing the Tribe. The sovereign immunity of the tribe itself prevented the Commission from using those methods, however, the Court did rule that nonmember transactions on Indian Country were properly taxable and other methods of enforcement were available to collect those taxes. In the present case, the tax enforcement is aimed at

individual tribal members as opposed to the Tribe. The Tribe is not being required to do or yield anything.

Second, the focus of this inquiry is not tribal immunity. The focus is whether the State action is prohibited in this case either because it is pre-empted by federal law or it infringes the right of reservation Indians to make their own laws and be ruled by them. The Appeals Court cited the language in ***McClanahan*** which stated, "by imposing the [income] tax...the State has interfered with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves." But the Appeals Court never cited the federal statute or treaty pertaining to the Sac and Fox which provides this result. The Tenth Circuit decision is contrary to ***Bracker*** which stated at 448 U.S. 145:

> This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

Instead of entering any inquiry at all, the Tenth Circuit found that the Commission's action violated the essence of the ***McClanahan*** decision. Therefore, the Appeals Court applied the "McClanahan presumption" to rule that the Commission had exceeded its authority to tax the income of Sac and Fox tribal members since there is no congressional authority for imposing the state taxes at issue. Evidently, the Tenth Circuit Order has taken unwarranted liberty in presuming that any State of the Union has ever requested or received congressional authorization to impose any tax on its citizens and has also presumed that the mere citation of the ***McClanahan*** case disposes of the issue.

Finally, the issue of the extent or existence of the Sac and Fox reservation is a relevant issue in this case. Merely because a tribal member has some connection to Indian Country does not mean

that he or she may avoid paying nondiscriminatory taxes by tagging the base on Indian Country every once in a while. In ***Bracker*** at 448 U.S. 151, this Court stated:

> The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the preemption inquiry, though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits.

Therefore, the Commission submits that this inquiry must begin with an investigation of the extent of the reservation to determine what manner of creature we are dealing with. It would be appropriate to briefly review the history of the Sac and Fox at this time.

According to ***A Guide to the Indian Tribes of Oklahoma***, Muriel H. Wright, C.1951 University of Oklahoma Press, the Sac and Fox are indigenous to the Great Lakes region of the United States. The Tribe later migrated South and settled along the Mississippi and Missouri Rivers in the States of Illinois, Iowa and Missouri where they remained until the middle of the nineteenth century. Then, by a series of treaties, the Sac and Fox ceded all their rights to lands in other states for two reservations in Kansas. When the lands in the Kansas reservation were gradually sold to encroaching white settlers, the Tribe negotiated the ***Treaty with the Sac and Foxes of February 18, 1867***, 15 Stat. 495 whereby a reservation was granted to the Tribe in Indian Territory in exchange for the cession of the Kansas reservations, and the Tribe was removed from Kansas. The United States also agreed to pay a dollar an acre for the ceded lands plus all outstanding indebtedness of the then financially-strapped Tribe.

In the years immediately following our Civil War, approximately 65 tribes were removed to Indian Territory in this manner and most of the Territory became occupied with contiguous Indian reservations from border to border. However, by the year

1887, Congressional policy changed with the enactment of the ***Daws Severalty Act***, 24 Stat. 388, which provided for allotments of the Indian reservations with the remaining unallotted lands on those reservations to be purchased by the government and thrown open to homesteading. By this time, the reservation system was deemed a failure in Indian Territory and the Congressional policy at that time intended to disestablish and individualize all of the reservations in Indian Territory with a view to the ultimate creation of the State of Oklahoma. This process is described in detail in the case of ***Woodward v. DeGraffenried***, 238 U.S. 284 (1915), which explains the vast problems experienced with the reservation system in Indian Territory and the efforts of Congress to dispose of that system in order to solve those problems.

The process was basically divided into two parts. First, the ***Oklahoma Organic Act of May 2, 1890***, 26 Stat. 81, created Oklahoma Territory, complete with a territorial government, which was established in the Western one-half of what is now the State of Oklahoma and included the Sac and Fox Reservation along with several other small tribes. The Eastern one-half of the State remained Indian Territory, which did not have an organized territorial government and which was occupied by the Five Civilized Tribes. The Jerome Commission was then created to negotiate cession agreements with the tribes in Oklahoma Territory and the Dawes Commission was appointed to negotiate with the Five Civilized Tribes in order to join the two territories into the State of Oklahoma.

The Jerome Commission negotiated the ***Sac and Fox Allotment Agreement of February 13, 1891***, 26 Stat. 749. In this Act the Sac and Fox Nation "hereby cedes, conveys, transfers, surrenders and forever relinquishes to the United States of America, all their title, claim or interest, of every kind or character, in and to the following described tract of land...". The Act provided that the quarter section (160 acres) of land where the Sac and Fox Agency is located would remain the property of the Tribe as well as the section (640 acres) of land designated for a school and farm. The Act also provided that each member could select a quarter-section for an allotment and in consideration for the cession of land, the

United States agreed to pay $485,000.00 to the Tribe. The surplus land was then opened for homesteading on September 22, 1891, by the ***Presidential Proclamation of September 18, 1891***, 27 Stat. 989.

The case of ***DeCoteau v. District County Court***, 420 U.S. 425 (1975) construes a cession agreement with terms very similar to the Sac and Fox Agreement, see note 22 at 420 U.S. 439 for comparable terms in several other agreements. The ***DeCoteau*** case involved the Sisseton-Wahpeton Agreement which was contemporaneous with the Sac and Fox Agreement and was managed similarly by the Federal Government. Under similar circumstances this Court ruled that the face of the Act, its surrounding circumstances and legislative history all point unmistakably to the conclusion that the reservation was terminated, at 420 U.S. 444-445. In such a situation, exclusive tribal and federal jurisdiction is limited to the retained allotments, 420 U.S. 446. The Court concluded that the surrounding circumstances are fully consistent with an intent to terminate the reservation, and inconsistent with any other purpose, 420 U.S. 448. The Court recognized our current problem in Note 3 at 420 U.S. 429 that isolated tracts of Indian Country may be scattered checkerboard fashion over a territory otherwise under state jurisdiction which will lead to legal conflicts regarding conduct of persons having mobility over the checkerboard territory.

The Sac and Fox Allotment Agreement demonstrates that the reservation was disestablished and therefore, the extent of Indian Country in Oklahoma consists of scattered plots of trust land. This presents the task of sorting out the conflict in terms of whether State laws are barred in this case by one of the barriers mentioned in the ***Bracker*** case, namely pre-emption or infringement.

B. THE STATE INCOME TAX DOES NOT INFRINGE TRIBAL SELF-GOVERNMENT, NOR IS IT PRE-EMPTED BY THE RELEVANT FEDERAL STATUTE.

Although the two barriers of infringement and pre-emption are independent, they are so related that the existence of one barrier is inevitably tied to the existence of the other barrier, as the case of ***Williams v. Lee***, 358 U.S. 217 (1959), demonstrates.

In ***Williams***, the Court held that a non-Indian could not sue a Navajo tribal member in state court for collection of a debt which arose from sales of goods on the reservation, but must instead sue the tribal member in the Navajo tribal court system. This decision was based on the Court's early case of ***Worcester v. Georgia***, 6 Pet. 515 (1832), which held that the laws of a state can have no force within an Indian reservation. However, the Court described the ***Worcester*** principles as somewhat broad and stated at 358 U.S. 219, that over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of ***Worcester*** has remained. The Court then held:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.

The Court concluded at 358 U.S. 223 that to allow the exercise of state jurisdiction would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. But the Indians only had a right to self-government by virtue of the ***Treaty with the Navajos***, June 1, 1868, 15 Stat. 667. This treaty provided that, in return for the Navajos' promises to keep peace, a reservation was "set apart" for "their permanent home" a portion of what had been their native country, and provided that no one, except United States personnel, was to enter the reserved area. The Court found that implicit in these treaty terms was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed.

Therefore, the Court found that tribal self-government was

infringed based on specific treaty terms which established that right. In the case at bar, the Tenth Circuit did not look to the relevant statute for guidance but merely concluded that the State law was pre-empted only because the Sac and Fox Nation was a federally recognized Indian tribe, see Tenth Circuit opinion at Pet. Cert. A-4. However, that status alone does not pre-empt state laws. The pre-emption must be provided in a federal statute.

But the ***Williams*** case explains that pre-emption of state laws is not provided for the Oklahoma Indians. At 358 U.S. 220-221, the Court found that Congress has followed a policy calculated eventually to make all Indians full-fledged participants in American society. This policy contemplates criminal and civil jurisdiction over Indians by any state ready to assume the burdens that go with it as soon as the educational and economic status of the Indians permits the change without disadvantage to them. Significantly, when Congress has wished the states to exercise this power, it has expressly granted them the jurisdiction which ***Worcester v. State of Georgia*** had denied. The Court cites instances in which states have been granted such jurisdiction in footnote 6, 358 U.S. 221, which states that the series of statutes granting extensive jurisdiction over Oklahoma Indians to state courts are discussed in the treatise entitled ***Federal Indian Law***, 1972 ed. complied by the United States Solicitor for the United States Department of Interior, at pages 985-1051. This treatise discusses the history of Indian Territory and the creation of the State of Oklahoma as well as the enactment of special laws for Oklahoma Indians. See also, ***Felix S. Cohen's Handbook of Federal Indian Law***, 1982 ed., for a similar discussion at pages 770-797.

The ***Williams*** case suggests that the federal government has not granted exclusive jurisdiction over tribal members to the Oklahoma tribes and has therefore modified the ***Worcester*** principles to accommodate state jurisdiction over Indians despite the fact that Indian Country and tribal governments do exist in Oklahoma. But their existence is not the question, nor the determining factor, rather, the question is, has the federal government pre-empted state law. In Oklahoma, the state government has assumed the burden that ***Williams*** requires in order to exercise

state jurisdiction, see ***Oklahoma Tax Commission v. United Sta*** 319 U.S. 598 (1943) at 608-610, and Congress has not denied s jurisdiction through legislation. In the ultimate sentence of the ***Willia*** case, the Court stated:

> If this power is to be taken away from them, it is for Congress to do it. ***Lone Wolf v. Hitchcock***, 187 U.S. 553 (1903).

Lone Wolf concerned a lawsuit brought by the Kiov Comanche and Apache (KCA) Tribes in Oklahoma which alleg that Congressional Acts which allotted the KCA reservation severalty and opened the ceded lands to white settlement, violat the property rights of the KCA and deprived the KCA of the lands without due process of law, contrary to the Constitutio The Court ruled that plenary power over tribal relations has be exercised by Congress from the beginning, and the power h always been deemed a political one, not subject to be controlle by the judicial department of government. The power exists abrogate the provisions of an Indian treaty unilaterally if such contingency should arise in the consideration of governmenta policy. ***Lone Wolf*** is an example of Congressional abrogation exclusive tribal authority or self-government. The case at bar i similar to ***Lone Wolf*** because the Sac and Fox were treated uni formly with the KCA tribes in terms of the cession agreement that were entered in the years preceding Statehood.

Therefore, Oklahoma's income tax law as enforced agains individual tribal members does not infringe tribal self-government nor is it pre-empted by federal law because the ***Sac and Fox Allotment Agreement*** does not preclude the extension of state law or imply that the tribal members remained exclusively within the jurisdiction of the tribal government in contrast to the Navajo treaty in the ***Williams*** case. As this Court has ruled in ***County of Yakima v. Yakima Indian Nation***, ___ U.S. ___, 112 S.C. 683 (1992), the objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries and force the assimilation of Indians into the society at large. Nowhere else was the United States more successful in accomplishing these

objectives than in Oklahoma. Certainly, the allotment agreement does not pre-empt state law and the taxation of the income of a tribal member does not infringe tribal self-government because the Tribe is not required to do anything. The fact that an individual pays state income tax does not lessen his duty to pay tribal taxes nor does it prevent the Tribe from operating its government within the jurisdiction which Congress has specified for it. Also, the Oklahoma taxes will be the sole responsibility of the individual tribal member, not the Tribe. The Tribe cannot be required even to withhold state taxes on the wages it pays to employees. ***Oklahoma Tax Commission v. Citizen Band Potawatomi***, ___ U.S. ___, 111 S.C. 905 (1991).

The state can collect these taxes from individual tribal members who earn wages from tribal or nontribal employment because this Court has previously ruled that such taxation is valid since the ***Worcester*** principles were modified in regard to Oklahoma Indians. The first such case is ***Leahy v. State Treasurer of Oklahoma***, 297 U.S. 420 (1936), which involved the state's taxation of a member of the Osage Tribe on income he received from the restricted mineral resources of the Tribe. The Court ruled that the state could tax this income pursuant to ***Choteau v. Burnet***, 283 U.S. 691 (1931). ***Choteau*** concerned whether an Osage tribal member was required to pay federal income tax on his earnings from the Tribe's mineral interest. The Court found that the tribal member's share of the royalties from oil and gas leases was payable to him without restriction upon his use of the funds so paid. Even though his homestead was restricted from alienation and was Indian Country, that fact was only significant as evidencing the contrast between his qualified power of disposition of that property and his untrammeled ownership of the income in controversy. His income was clearly beyond the control of the United States. The duty to pay it into his hands, and his power to use it after it was so paid were absolute. Therefore, the income was taxable both by the federal and state governments even though the Indian resided on Indian Country and received income from tribal sources, such as in the case at bar.

Next, the Court ruled that the state had authority to recover

inheritance taxes imposed on the transfer of the estates of three deceased members of the Five Civilized Tribes except for the homestead which was held in trust and was tax exempt as Indian Country in ***Oklahoma Tax Commission v. United States***, 319 U.S. 598 (1943). In that case, the Court distinguished the holding in ***Worcester v. Georgia*** at 319 U.S. 602 because the theory that Indian tribes were separate political entities with all the rights of independent status is a condition which has not existed for many years in the State of Oklahoma. The Court found that the underlying principles on which the reservation decisions are based do not fit the situation of the Oklahoma Indians. "Although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy as in ***Worcester v. Georgia***, supra; and, unlike the Indians involved in ***The Kansas Indians*** [5 Wall. 737] case, they are actually citizens of the state with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions."

In contrast to the findings in the ***Williams*** case, the Court found at 319 U.S. 608-609 that Oklahoma has assumed the burdens of jurisdiction over the Indians in this state, which Indians are educationally and economically sophisticated enough to accept this status without disadvantage. Recognizing that equality of privilege and equality of obligation should be inseparable associates, the Court found that it is not unreasonable that the duty to pay taxes, which are based solely on ability to pay, should rest on these Indians.

The Tenth Circuit refused to consider or discuss these applicable opinions apparently under the misconception that the Commission was attempting to argue that the holding in ***McClanahan v. Arizona State Tax Commission***, 411 U.S. 164 (1973) was not controlling because tribal governments do not exist in Oklahoma. This was not the Commission's position. Certainly the Sac and Fox Nation is complemented with a valid government. This Court recognized tribal government exists in Oklahoma but explained in ***Oklahoma Tax Commission v. United States*** that these tribes have no effective tribal autonomy apart from state government in contrast to the situation found in the ***Worcester*** case. Therefore,

the ***Worcester*** principles are modified in such a situation to accommodate state jurisdiction, ***Williams***.

The ***McClanahan*** case therefore, does not stand as a convenient trump card played against state law to allow Indians an avenue to avoid income taxes as the Tenth Circuit suggests. On the contrary, the ***McClanahan*** case cites ***Oklahoma Tax Commission v. United States*** as an example of a situation where Indians within Indian Country who earn income from tribal sources are properly taxable by the state. At 411 U.S. 171, the Court stated, "...the doctrine has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community. See, e.g., ***Oklahoma Tax Commission v. United States***..." Although the Sac and Fox Nation does maintain jurisdiction over scattered tracts of Indian Country in Oklahoma, this situation is not equivalent to the Navajo Reservation. The Court distinguished the two situations at the outset in ***McClanahan*** at 411 U.S. 167 where the Court stated, "We are not here dealing with Indians who have left or never inhabited reservations set aside for their exclusive use or who do not possess the usual accoutrements of tribal self-government."

The Tenth Circuit opinion would not consider the difference between the Sac and Fox quarter section and the 7.6 million acre Navajo Reservation, but reasoned that if a parcel of Indian Country exists, no matter how small, then ***McClanahan*** applies of its own force to pre-empt state law. This reasoning does not follow because the sine qua non of the pre-emption or infringement inquiry is a federal statute. The Supreme Court opinion does not pre-empt state law, only an Act of Congress can do so. Therefore, this Court began its analysis in ***McClanahan*** with the relevant treaty because the modern cases tend to avoid reliance on platonic notions of Indian sovereignty and look instead to the applicable treaties and statutes which define the limits of state power. The Indian sovereignty doctrine does not provide a solution but only a backdrop against which federal statutes must be read.

After reviewing the circumstances of the Navajo treaty in ***McClanahan***, the Court found that the treaty reserved certain

lands for the exclusive use of the Navajo under general federal supervision which precluded the extension of state law to the Navajos on the Reservation. The case at bar is not confronted with such circumstances. The Sac and Fox Allotment Agreement was intended to open the reservation of the Sac and Fox to any and all immigrants of whatever creed to go forth and possess the land. At all times contemporaneous with and subsequent to the Agreement, it was the intent of Congress to dispose of the reservations in favor of creating a State for the Union. It was furthermore always contemplated that state laws would extend to all persons residing in the former reservations as a matter of course. Therefore, the Indian tribes in Oklahoma were assimilated into the general society by this process and lost the exclusive autonomy enjoyed by tribes which inhabit federal reservations. Under these circumstances, the federal statute does not pre-empt the state income tax and the tax does not burden the geniune operation of tribal government as it currently exists in Oklahoma.

II. SAC AND FOX TRIBAL MEMBERS ARE NOT EXEMPT FROM STATE MOTOR VEHICLE EXCISE TAXES, LICENSE AND REGISTRATION FEES WHEN THE MEMBERS TRIBALLY LICENSE THEIR VEHICLES.

The Tenth Circuit ruled in Part III-A of its opinion, Pet. Cert. A-7, that a state may not require a tribal member residing on tribal lands to pay state motor vehicle taxes pursuant to the Appeals Court's interpretation of this Court's rulings in ***Moe v. Confederated Salish and Kootenai Tribes***, 425 U.S. 463 (1976), and ***Washington v. Confederated Tribes of Colville***, 447 U.S. 134 (1980). Apparently the Tenth Circuit thought these cases were applicable to the case at bar because the cited cases concerned whether the state could tax motor vehicles owned by reservation Indians and used both on and off the reservation. Other than stating that the cases are dispositive, the lower Court does not indicate how or why these cases are controlling authority for its opinion in the present case. The Commission contends that ***Moe***

and ***Colville*** do not provide such authority.

The circumstances in this case are that both the state and the Tribe have imposed motor vehicle taxes. The Tribe purports to tax all vehicles owned by residents of its "jurisdiction". This case does not involve the tribal tax and the state does not contend that the Tribe may not levy this tax. However, the state does assert that the tribal tax does not oust the state's tax on those same vehicles used in this state.

Oklahoma levies two different taxes on motor vehicles. The first tax is the Vehicle Excise Tax found at title 68 O.S. 1991 §2101 et seq. Pursuant to Section 2103 of this Act, an excise tax of 3 1/4% of the value of each vehicle is levied upon the transfer of legal ownership of any vehicle registered in this state. Next, an annual registration fee is imposed under the Oklahoma Vehicle License and Registration Act, title 47 O.S. 1991 §1101 et seq. Pursuant to Section 1132 of this Act, Subsection A sets out the following fees: (1) a registration fee of $15.00 per year for the use of the avenues of public access within this state, and (2) an annual fee in lieu of all other taxes of 1 1/4% of the factory delivered price for the first year and in each subsequent year the fee will be 90% of the previous year's fee.

The Tenth Circuit ruled that the state's motor vehicle taxes were property taxes and are therefore prohibited under ***Moe*** and ***Colville***. However, the Supreme Court of the State of Oklahoma has ruled in ***Application of Baptist General Convention of Oklahoma***, 195 Okl. 258, 156 P.2d 1018 (1945) that these motor vehicle taxes are excise taxes, and not property taxes, because the Oklahoma Constitution, Art X, Section 6, exempts churches from property taxes, and by ruling that the tax was an excise tax, the Oklahoma Supreme Court held that churches were not exempt from those taxes. However, this is a minor mistake because the ***Colville*** opinion indicates at 447 U.S. 163 that the tax will not escape the prohibition merely by denominating the tax as an excise tax rather than a property tax.

The real problem is whether the state taxes are pre-empted by federal law or infringe tribal self-government. The Commission insists that the Tenth Circuit did not resolve this issue in its Order.

A. VEHICLE EXCISE TAXES.

The Vehicle Excise Tax is imposed upon the transfer of legal ownership of a vehicle registered in Oklahoma. The tax is not paid annually but is paid by the purchaser of a vehicle in order to obtain a certificate of title. Therefore, the tax is only paid when a vehicle is sold and the new owner applies to the Commission to have the vehicle titled in his or her name. In this instance the Vehicle Excise Tax closely resembles a sales tax imposed on the sale of other kinds of personal property.

The question is whether this tax is prohibited when a Sac and Fox tribal member purchases an automobile from an auto dealer, if that tribal member intends to park his or her car on Sac and Fox Indian Country. In this case, we are not concerned with the massive federal reservations which were a part of the ***Moe*** and ***Colville*** cases because, as the Commission has discussed in the income tax portion of this brief, the Sac and Fox Reservation was disestablished in favor of Oklahoma Statehood, leaving in its wake only scattered plots of Indian Country within an area otherwise under state jurisdiction. Therefore, this transaction occurs between a tribal member and a nonmember off of Indian Country. Generally, Indians going beyond reservation boundaries have been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state, ***Mescalero Apache Tribe v. Jones***, 411 U.S. 145 at 149 (1973). It cannot be contended that when a tribal member purchases groceries, hardware, appliances or other goods at businesses off of Indian Country, the tribal member would be exempt from applicable sales taxes just because those goods might be used on Indian Country in the future. The purchase of automobiles should not receive any different treatment. There is no reason or authority whereby the purchase of a car by an Indian should be exempt from tax in this situation.

Of course, the tribal members' tax burden in this case will be heavier than that borne by other auto buyers because the member will be subject to both the state and the tribal tax. However, this is only the natural consequence of being subject to concurrent jurisdiction of two different governmental entities, see e.g. ***Cot-***

ton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989). The taxes are not discriminatory and there is no direct conflict between the state and tribal schemes, since each government is free to impose its taxes without ousting the other. There has been no showing in this case by the Tribe that there was ever an intent on the part of Congress to authorize this Tribe to pre-empt otherwise valid state taxes by imposing its own tax. Therefore, the state tax is due on the transfer of the vehicle regardless of whether or not tribal taxes have been paid. Also, the payment of the state tax is entirely borne by the tribal member such that the economic burden of the tax would never be felt by the Tribe and tribal self-government would not be infringed by it.

But most importantly, the vehicle excise tax is not pre-empted by federal law. In ***Moe*** the Court ruled, "Enactments of the federal government passed to protect and guard its Indian wards only affect the operation, within the colony, of such state laws as conflict with the federal enactments." In ***Moe***, the ***Treaty of Hell Gate***, 12 Stat. 975, set aside 1.25-million acres for the Flathead Reservation in Montana. In ***Colville***, the Colville Reservation contains 1.3-million acres in Washington established by Executive Order on July 2, 1872. This Court found at 447 U.S. 156 that the relevant treaties pertaining to the Colville tribes can be read to recognize inherent tribal power to exclude non-Indians or impose conditions on those permitted to enter. But in the case at bar, the Sac and Fox Treaty was discarded, the reservation disestablished, and the Tribe was not allowed the power to exclude non-Indians or impose any conditions on them because the federal government opened the land to a flood of white settlers who soon organized the territory for statehood. Therefore, the relevant statute, the Allotment Agreement in this case, contemplated that state law would be applied rather than excluded. As a result, tribal and federal jurisdiction is limited to the scattered plots of Indian Country which remain and the taxable transactions in this case do not occur within those areas.

In light of its policy and the intended result, the Congressional plan embodied in the Sac and Fox Allotment Agreement did not intend to pre-empt state taxing authority. Further, there is no

immunity for off-reservation activities that have traditionally been recognized in any of the controlling cases. The backdrop of Indian sovereignty does not provide any tradition of immunity with regard to this allotment agreement because it was never the intention of Congress to preclude the extension of state law in this area. Therefore, the Tenth Circuit improperly prohibited the vehicle excise tax as applied to tribal members in this case.

B. VEHICLE REGISTRATION FEES.

The vehicle registration fee is paid annually and is imposed on all vehicles owned within Oklahoma. Pursuant to title 47 O.S. 1991 §1132(A), the fee consists of a $15.00 fee for the use of the avenues of public access in this state in addition to a fee in lieu of all other taxes of 1 1/4% of the vehicle's factory delivered price for the first year, which is reduced to 90% of the previous year's fee in the following years.

Under title 47 O.S. 1991 §1103, the purpose of the fees is to provide funds for the general governmental functions of the state, counties, municipalities and schools and for the maintenance and upkeep of the avenues of public access of this state. The fees apply to every vehicle operated upon, over, along or across any avenue of public access within this state and when paid, are in lieu of all other taxes.

As with the other taxes at issue, the question with regard to these fees is whether they are pre-empted by federal law. The ***Moe*** and ***Colville*** cases dealt with similar taxes regarding vehicles owned by tribal members and used both on and off the reservations. The Court held in ***Colville*** that Washington was free to tax the use of those vehicles outside of the reservation but since the state had not tailored its tax to the amount of off-reservation use but taxed those vehicles at the rate all other vehicles were taxed, the taxes were held to be prohibited. Of course, the tax was prohibited because the relevant treaties, ***Treaty of Point Elliott***, 12 Stat. 927 (1855); ***Treaty with the Makah Tribe***, 12 Stat. 939 (1855); ***Treaty with the Yakimas***, 12 Stat. 951 (1855) can be read to recognize inherent tribal power to exclude non-Indians or impose

conditions on those permitted to enter, ***Colville***, at 447 U.S. 156. This was similar to the Navajo Reservation in ***McClanahan*** which set apart certain lands for the exclusive use of the Navajos as a permanent home in what had been their native country. That situation is not similar to the case at bar.

In this case, as has been discussed, the relevant statute is the Sac and Fox Allotment Agreement which did not set apart certain lands exclusively for the Sac and Fox in their native country, but instead it allotted the lands in severalty for the purpose of assimilation of the Sac and Fox into the general community of the state. Although the Agreement did not abolish tribal government, the autonomy of the government was eliminated. Accordingly, the Allotment Agreement does not pre-empt any state tax law. If Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences, ***Oklahoma Tax Commission v. United States***, supra. Furthermore, it is interesting to note that the tribe in ***Moe*** only contested payment of Montana's personal property tax and agreed that a fee required for registration and issuance of state license plates for a motor vehicle could be exacted from Indians residing on the reservation, see 425 U.S. 469 and footnote 9.

The backdrop of Indian sovereignty does not provide a tradition of immunity with respect to the relevant statute in this case sufficient to pre-empt nondiscriminatory state laws. The Agreement provides no federal supervision or exclusive control upon which pre-emption can be based and nothing in the Act, its surrounding circumstances or its legislative history indicates any intent on the part of Congress to occupy the field or pre-empt the operation of state law in this area. This Court has cautioned against invalidating any state taxation absent the clearest mandate, ***Michelin Tire Corp. v. Wages***, 423 U.S. 276 (1976). Congress has declined to extend such a mandate to the Indians in this case. Given the attitude of Congress in the Allotment Agreement, Congress never intended to prevent Oklahoma from levying these taxes, which is the primary consideration in the pre-emption inquiry.

The state is within its authority to collect these motor vehicle taxes for the further reason that the state has a greater interest in the revenues than has the Tribe. In sorting out these competing interests, the Court has provided this guidance in the ***Colville*** decision at 447 U.S. 156-157:

> While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

In the case at bar, the state has the strongest interest in imposing its annual registration fee as opposed to the Tribe because the state has the sole obligation of building and maintaining roads in Oklahoma as well as providing related government services to the motoring public. The tribal member taxpayers in this case are the direct beneficiaries of these roads and services which are not provided by the Tribe. Also, the registration fees are directed at off-reservation value.

In Oklahoma, neither the Sac and Fox, nor any of the other forty different tribes located here, build or maintain streets, roads or highways since the Indian Country is broken up into small scattered tracts and the State provides all the necessary roads in the first place. The Sac and Fox have built driveways or parking lots on their land, but this is nothing that any other private landowner would not do. However, the total mileage of driveways built by the Sac and Fox is de minimum compared to the over 111,000 miles of roads provided by the State and local governments. However, the Tribe argues that tribal employees park their cars on Indian Country for a much greater part of the workday than the drive time in which those cars are on State jurisdiction roads. The State submits that this may be true but irrelevant because

the value of an automobile is principally realized by using it to travel across the roadways rather than parking it in a parking lot. The registration fees are therefore aimed at off-reservation value since the use of a vehicle in Oklahoma is necessarily off-reservation only.

The State vehicle registration system also provides safety and security to the motoring public. The State registration provides information on the ownership of vehicles that can be accessed by police when vehicles are involved in criminal activity. Also, the State requires vehicle registrants to carry automobile insurance to provide financial responsibility for damage that the operator of a vehicle may cause. The State title laws protect the ownership interest in vehicles as well as the security interest of financial institutions who lend on the vehicle as collateral by providing a statewide filing system to record this information with the Tax Commission and other State law enforcement agencies that safeguard the vehicle from theft, title counterfeiting, title laundering, or tampering with odometer readings. If the Tax Commission is compelled to accept at face value a title from any one of forty different tribal governments in this state, the functions of the State registration system would be compromised. If motor vehicle titles could be easily obtained at low cost from a variety of tribal governments which have less experience and sophistication in maintaining proper controls over a registration system, along with the fact that tribal records are inaccessible to state agencies, then that situation would result in unacceptable losses to auto dealers, banks, insurance companies and automobile owners and buyers as well as hindering law enforcement.

On the other side of the scale, the only thing the Tribe offers for its registration is the opportunity for the registrant to pay tribal taxes. The Tribe will provide no roads or any of the attendant governmental services that the State provides to vehicle owners. Under the balancing approach, the Tribe offers little of anything in return for its taxes while the State provides the totality of transportation and governmental services to these taxpayers. This is a case in which the State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes

fall. Since the federal legislation disestablishing the reservations in Oklahoma has left the Tribe with no duties or responsibilities respecting road building and related services, it cannot be contended that Congress intended to leave to the Tribe the privilege of levying this tax to the exclusion of similar State taxes. The State does not contend that the Tribe should be prohibited from levying this or any tax, but the State does contend that the tribal tax levy does not oust the imposition of State taxes on tribal members' activities off of Indian Country.

This Court ruled in ***Oklahoma Tax Commission v. United States***, at 319 U.S. 608-609, that Congress has passed laws under which Indians have become full-fledged citizens of the State of Oklahoma. Oklahoma supplies for the Indians, and their children, schools, roads, courts, police protection and all the other benefits of an ordered society. Citizens of Oklahoma must pay for these benefits. If some pay less, others must pay more. Within the circumstances of this case relating to taxation of Sac and Fox tribal members, there is nothing in this burden which frustrates tribal self-government or runs afoul of any congressional enactment dealing with the affairs of reservation Indians.

CONCLUSION

For these reasons, the Oklahoma Tax Commission respectfully requests this Court to reverse that part of the opinion of the Tenth Circuit Court of Appeals which enjoined and prohibited the Commission from collecting income taxes on wages earned by Sac and Fox tribal members from tribal employment, and from enforcing the vehicle excise tax and registration laws against tribal members who properly licenses their vehicles with the Tribe and allow the Commission to collect those taxes.

Respectfully submitted.

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